77-947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Miscellaneous No. _____

DONALD E. BORDENKIRCHER,
SUPERINTENDENT, KENTUCKY
STATE PENITENTIARY — PETITIONER

V.

JOHN RANDOLPH GASTON — RESPONDENT

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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The respondent, John Randolph Gaston, respectfully prays that a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Sixth Circuit be denied.

OPINION BELOW

The opinion below is correctly stated by Petitioner.

JURISDICTION

The jurisdiction is correctly stated by Petitioner.

QUESTIONS PRESENTED

I. WHETHER THIS COURT'S DETERMINATION IN *BORDENKIRCHER V. HAYES*, ___ U.S. ___ (NO. 76-1334, DECIDED JANUARY 18, 1978) THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT VIOLATED WHEN A STATE PROSECUTOR CARRIES OUT A THREAT MADE DURING PLEA NEGOTIATIONS TO HAVE THE ACCUSED REINDICTED ON MORE SERIOUS CHARGES ON WHICH HE IS PLAINLY SUBJECT TO PROSECUTION IF HE DOES NOT PLEAD GUILTY TO THE OFFENSE WITH WHICH HE WAS ORIGINALLY CHARGED, (Pp. 3-9) SHOULD NOT ALTER THE FINAL DISPOSITION OF THE CASE AT BAR.

II. WHETHER THE APPLICATION OF THE HABITUAL CRIMINAL STATUTE AFTER FAILURE OF PLEA NEGOTIATIONS IS A DENIAL OF EQUAL PROTECTION WHEN THE STATUTE IS APPLIED ONLY TO THOSE INDIVIDUALS WHO REFUSE THE PROSECUTOR'S PLEA BARGAIN.

NOTICE

Although the decision below was based on *Hayes v. Cowan*, 547 F.2d 42 (6th Cir, 1976), certiorari granted sub nom *Bordenkircher v. Hayes*,(No. 76-1334, ___ U.S. ___ decided January 18, 1978), the lower court could have reached the same result by considering the question of equal protection. Thus, the reversal of *Hayes*, i.d., should not alter the final disposition of the case at bar.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are correctly stated by Petitioner.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

The nature of the case is correctly stated by Petitioner.

II. DECISION OF THE COURT BELOW.

The decision of the court below is correctly stated by Petitioner.

III. COURSE OF THE PROCEEDINGS.

The course of proceedings is correctly stated by Petitioner. Further, in his original application for a writ of habeas corpus in the United States District Court for the Western District of Kentucky, Respondent claimed a denial of equal protection based on the Commonwealth's selective application of the habitual criminal statute. The district court entered a judgment denying application. The decision was appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit vacated judgment and remanded the case to the district court to determine whether the prosecutor threatened Gaston with seeking an indictment under the habitual criminal statute. The Sixth Circuit did not address itself to the issue of equal protection.

REASONS FOR DENYING THE WRIT

This Court's determination in *Bordenkircher v. Hayes*, (No. 76-1334, decided January 18, 1978) that the Due Process Clause of the Fourteenth Amendment is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged, (Pp. 3-9) should not alter the final disposition of the case at bar.

This is so because the application of a habitual criminal statute after failure of plea negotiations is a denial of equal protection when such statute is applied only to those individuals who refuse the prosecutor's plea bargain.

I.

THIS COURT'S DETERMINATION IN *BORDENKIRCHER V. HAYES*, (NO. 76-1334, DECIDED JANUARY 18, 1978) THAT THE DUE

PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT VIOLATED WHEN A STATE PROSECUTOR CARRIES OUT A THREAT MADE DURING PLEA NEGOTIATIONS TO HAVE THE ACCUSED REINDICTED ON MORE SERIOUS CHARGES ON WHICH HE IS PLAINLY SUBJECT TO PROSECUTION IF HE DOES NOT PLEAD GUILTY TO THE OFFENSE WITH WHICH HE WAS ORIGINALLY CHARGED, (Pp. 3-9) SHOULD NOT ALTER THE FINAL DISPOSITION OF THE CASE AT BAR.

Gaston respectfully disagrees with this Court's decision in *Bordenkircher v. Hayes,* (No. 76-1334, decided January 18, 1978) for three reasons. First, a defendant who is initially indicted on all charges has ample opportunity to assess his situation and decide what course of action would be best for him. When an indictment is threatened during the heat of plea bargaining, such an opportunity does not so clearly exist. Unlike *Brady v. United States,* 397 U.S. 742, at page 754, (1970) there is a "hazard of impulsive and improvident response".

Secondly, this kind of behavior chills the exercise of basic constitutional rights by other defendants who look to past prosecutional actions in order to make decisions regarding their own cases. Other defendants, faced with completely

different charges might well be fearful that a prosecutor would, "up the ante" if they assert their constitutional rights. This fear might well exist whether or not a particular defendant is actually eligible for additional charges. This would have a chilling effect on due precess and "...insure that only the most hardy defendants will brave the hazards ..." of asserting constitutional rights. *Blackledge v. Perry*, 417 U.S. 21 at 27-28 (1974).

Thirdly, contrary to this Court's expression in *Hayes*, supra, Gaston believes that allowing additional counts after the refusal of a plea bargain invites unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged. *Hayes*, supra at page 8, citing *Blackledge v. Allison*, supra, 431 U.S. at 76. Traditional plea-bargaining where certain charges are dismissed in exchange for pleas to other charges is done in open court.

The "deal" is on the record. A judge officiates to make certain the defendant's plea is voluntary. Threats of additional charges take place outside the presence of the court and do not generally appear on the record. It is difficult to assess the amount of pressure which has been brought to bear.

Even if *Hayes*, supra, has been correctly decided, it should not control the decision in the case sub judice. First, in *Hayes* there was nothing in the record to indicate how much time *Hayes* had to consider the offer. In Gaston's case, Gaston contends the offer was made to him only once (appendix, page 12a). His attorney recalled that Mr. Gaston had approximately one week to think over his decision (appendix, page 7a). In any event, Mr. Gaston did not have a reasonable amount of time to consider his decision. Whether or not the prosecutor felt he would follow through on the original offer even while the jury was out is immaterial. Such feelings were apparently not conveyed to defense counsel (appendix, page 22a).

Secondly, Gaston has consistently raised the question of whether or not he was denied equal protection under the law. This question was not answered by the Sixth Circuit Court of Appeals. Gaston believes this question should be answered in the affirmative, rendering moot the question of Due Process which was raised in *Bordenkircher v. Hayes*, supra.

II.

THE APPLICATION OF A HABITUAL CRIMINAL STATUTE AFTER FAILURE OF PLEA NEGOTIATIONS IS A DENIAL OF EQUAL PROTECTION WHEN SUCH STATUTE IS APPLIED ONLY TO THOSE INDIVIDUALS WHO REFUSE THE PROSECUTOR'S PLEA BARGAIN.

The Commonwealth Attorney's office placed defendants eligible for prosecution under the Habitual Criminal Act into two separate classifications. One class consisted of defendants who did not insist upon a trial. Those individuals were not proceeded against as habitual criminals. The other class of defendants consisted of persons who asserted their constitutional right to a trial. These individuals were routinely

indicted as habitual criminals. A similar kind of classification was noted in *Shapiro v. Thompson,* 394 U.S. 618 (1968). In *Shapiro,* a residency requirement for Welfare recipients was struck down by this Court because;

> In moving from state to state...appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. *Id* at 634.

Shapiro can be distinguished from the case at hand because it deals with a statute which was defective on its face. Gaston's case deals with a statute which was applied in a discriminating manner. However, any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo v. Hopkins,* 118 U.S. 356 (1918). If state laws which serve to penalize the exercise of constitutional rights are examined by the standard of "compelling governmental interest", the application of the laws must be examined by the same standard.

Gaston is aware of this Court's dicta in *Hayes*, supra, that...

> To hold that a prosecutor's desire to induce a guilty plea is an "unjustifiable standard" which, like race or religion, may play no part in his changing decision, would contradict the very premises that underlie the concept of plea bargaining itself. (Page 8)

However, when actual classifications based solely on defendant's ammenability to plea bargaining are created as in the case sub judice, it is no longer a "conscious exercise of some selectivity in enforcement". *Hayes*, supra, citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962). It becomes an exercise of invidious discrimination. To excuse this kind of prosecutorial behavior is to invite recidivist statutes designed to coerce repeat offenders and save the expenses of trial with no thought to the fairness of the penalty imposed.

CONCLUSION

The Respondent respectfully requests this Honorable Court to deny Writ of Certiorari.

Respectfully submitted,

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PROOF OF SERVICE

I, Kathleen C. King, Counsel for Respondent, hereby certify that three (3) copies of the foregoing brief were mailed, postage prepaid, to Hon. George M. Geoghegan, Jr., Counsel for Petitioner, Capitol Building, Frankfort, Kentucky 40601, this 10 day of March, 1978.

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